UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELECTRONICALLY FILED

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DANIEL McGUIRE,

Plaintiff,

08 CIV 2049 (SCR)

-against-

VILLAGE OF TARRYTOWN; DREW FIXELL, Individually and in his capacity as Mayor of the Village Of Tarrytown; STEVE McCABE, individually and in his capacity as Village Administrator of the Village of Tarrytown; SCOTT BROWN, individually and in his capacity as Chief of Police of the Village of Tarrytown; SERGEANT FRANK J. GIAMPICCOLO, individually and in his capacity as police officer of the Village of Tarrytown; SERGEANT JOHN C. GARDNER, individually and in his capacity as police officer of the Village of Tarrytown; SERGEANT JOHN BARBALET, individually and in his capacity as police officer of the Village of Tarrytown; SERGEANT KEVIN BARBALET, individually and in his capacity as police officer of the Village of Tarrytown; POLICE OFFICER CHRISTOPHER COLE, individually and in his capacity as police officer of the Village of Tarrytown; POLICE OFFICER GREGORY M. BUDNAR, individually and in his capacity as police officer of the Village of Tarrytown; POLICE OFFICER DENNIS C. SMITH, individually and in his capacity as police officer of the Village of Tarrytown; POLICE OFFICER BRIAN F. MACOM, individually and in his capacity as police officer of the Village of Tarrytown; BARRY WARHIT, individually and in his capacity as justice of the Village of Tarrytown; SHAMEKA TAYLOR, individually and in her capacity as an Assistant District Attorney in the County of Westchester, DISTRICT ATTORNEY'S OFFICE, County of Westchester; COUNTY OF WESTCHESTER, STATE OF NEW YORK

Defendants.

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REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF COUNTY DEFENDANTS' MOTION TO DISMISS THE INSTANT ACTION PURSUANT TO RULE 12(b)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE

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PRELIMINARY STATEMENT

This memorandum of law is submitted on behalf of Defendants Assistant District Attorney Shameka Taylor, sued in her individual and official capacity and the County of Westchester (hereinafter referred to collectively as "County Defendants"), in reply to Plaintiff's opposition and in further support of the County Defendants' motion, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss the Complaint in its entirety.

POINT I

DEFENDANT TAYLOR IS ENTITLED TO ABSOLUTE IMMUNITY

A. Defendant Taylor, in Her Official Capacity, is Entitled to Immunity Under the Eleventh Amendment of The United States Constitution

As Plaintiff presents no arguments to the contrary, it is uncontested that to the extent that Plaintiff is seeking to hold Defendant Taylor liable in her ***official*** capacity, she are entitled to Eleventh Amendment immunity.[1] *See* Ying Jing Gan v. The City of New York, 996 F.2d 522, 535-536 (2nd Cir. 1993). As Plaintiff has failed to address this argument in the Memorandum in Opposition, it is respectfully submitted that the claims against Taylor in her official capacity be dismissed in their entirety.

B. Defendant Taylor is Entitled to Absolute Immunity in her Individual Capacity[2]

While acknowledging that absolute immunity analysis under the present state of the law calls for an analysis of the functions being performed by the prosecutor (Plaintiff's Memorandum in Opposition, p. 7), Plaintiff then offers a tortured interpretation of the law as applied to the instant facts in an attempt to create an exception that swallows a rule that he admittedly does not support. Plaintiff's conclusory contention that the absolute immunity doctrine is wrong and unworkable (Plaintiff's Memorandum in Opposition, p. 8) does nothing to resuscitate his client's claims against Defendant Taylor, which are clearly barred by that doctrine. Moreover, Plaintiff's attempt to characterize quintessential prosecutorial functions as investigative is a transparent attempt to put forth a legal argument entirely unsupported by any conceivable version of the facts of this case. Indeed, it is obvious that after reading the law, Plaintiff's counsel determined to find an "exception" to absolute immunity and then attempt, albeit disingenuously, to force the facts to fit. Insofar as the allegations against Defendant Taylor focus on her alleged actions, or inactions, *during the actual trial in this matter*, her actions fall squarely within those protected by absolute immunity. Plaintiff has made no allegation that Taylor acted, or failed to act, outside the prosecution of this action.

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[1] The Court is respectfully referred to Point I(A) of the County Defendants' Memorandum of Law in Support of its Motion to Dismiss for a more complete discussion of this issue.
[2] The Court is respectfully referred to Point I(B) of the County Defendant's Memorandum of Law in Support of its Motion to Dismiss for a more complete discussion of this issue.

Indeed, Plaintiff's counsel infuses pure speculation and assumption into Defendant Taylor's role, which is not supported by factual allegations in the Complaint. The following paragraph from Plaintiff's Memorandum in Opposition demonstrates the tortured lengths to which Plaintiff's counsel goes in order to attempt to avoid the application of prosecutorial immunity –

> At the time that ADA Taylor acquired evidence that was exculpatory to plaintiff, she put on her investigator's hat. It is in her refusing to investigate or acknowledge this exculpatory evidence that defendant ADA Taylor allowed plaintiff's rights to be violated. The complaint herein provides allegations and attachments that raise the material issue of fact and fair question for a jury as to whether defendant ADA Taylor was acting in an investigative or advocative capacity when she acquired exculpatory evidence. Plaintiff posits that upon testimony ***elicited at trial***, a reasonable prosecutor would have investigated further, and/or called John Barbalet to testify for the benefit of the jury. . . Plaintiff additionally

> posits that if defendant ADA Taylor did agree to avoid using defendant John Barbalet as a witness, such agreement was solely for the purpose of pursuing the prosecution of plaintiff herein, without regard to his liberty interests and rights. Since the prosecution of plaintiff McGuire was one of only a few criminal trials in Tarrytown that year (if not the only criminal trial), defendant ADA Taylor was certainly being supervised and advised by the Westchester County District Attorney's Office. Assuming that defendant ADA Taylor was being closely supervised due to her newness to the post, her supervisor must have been party to the decision to either forego investigation or *suppress the potentially exculpatory* testimony of defendant John Barbalet. [emphasis supplied]. Plaintiff's Memorandum in Opposition, at pp. 9-10.

Ignoring the glaring question of why Plaintiff's criminal defense attorney failed to call John Barbalet to testify, it is clear that even these inflated and speculative allegations against Defendant Taylor focus solely on her conduct during the trial of the criminal matter.

Furthermore, Plaintiff's counsel cannot arbitrarily identify an action or inaction taken during the trial as "investigative", and expect his random classification to preclude the applicability of absolute immunity. Without allegations that show that Taylor was acting outside the scope of her duties in initiating and/or pursuing criminal prosecution, Taylor is entitled to absolute prosecutorial immunity and Plaintiff's federal and state claims against Taylor should be dismissed in their entirety. *See* Shmueli v. City of New York, et al, 424 F.3d 231 (2d Cir. 2005) and Johnson v. Kings County District Attorney's Office, 308 A.D.2d 278, 763 N.Y.S.2d 635 (2nd Dept. 2003).

It is significant that although Plaintiff's counsel string cites the Shmueli case, he fails to distinguish said case from the facts of the instant case. The Second Circuit in Shmueli, *supra*, made very clear that once a court has determined that a prosecutor is not acting outside of his/her jurisdiction, "the prosecutor is shielded from liability for damages for commencing and pursuing the prosecution, *regardless of any allegations* *that [her] actions were undertaken with an improper state of mind or improper motive* [emphasis supplied]" *Id.* at 237. As is evident from both the face of the Complaint and Plaintiff's opposition, the only allegations against Defendant Taylor center on her role during the actual prosecution of Plaintiff's criminal case. Therefore, no matter what state of mind or motive Plaintiff attributes to Defendant Taylor, she is entitled to the protection of absolute prosecutorial immunity for all actions or inactions that she took during the prosecution of Plaintiff.

Moreover, the majority of the cases cited by Plaintiff's counsel do not support his arguments and are often clearly misinterpreted. Perhaps the most glaring example is the following alleged "holding" from Crews v. County of Nassau, 2007 U.S. Dist. LEXIS 94597 (E.D.N.Y. 2007)[3] –

> that court found that after being provided exculpatory information, prosecutor "did not inform [Plaintiff's] counsel or the . . . County, or investigate this exculpatory information.' *Id.* at 3. 'Absolute immunity does not protect such alleged misconduct that took place in the course of participation in and supervision of criminal investigations." Plaintiff's Memorandum in Opposition, p. 8.

Although both of these quotes do appear in the Crews case, they do not coincide with each other. Indeed, their pairing is especially misleading as it implies that the Court held that the prosecutor was not entitled to absolute immunity because he failed to investigate exculpatory information. However, that is not the holding of the Crews case.

The first sentence in the above referenced excerpt from Plaintiff's Memorandum, is from the Court's recitation of the "Facts" of the case which details the allegations from the complaint (*id.* at p. *6, not page 3 as cited by Plaintiff's counsel). The Court

[3] County Defendants' cite to the official cite of the cases cited by Plaintiff's counsel, who often failed to provide proper citation to the cases cited in the Memorandum of Law in Opposition, often providing only the index number of the case as the cite.

specifically notes in the preface of this "Facts" section that the "following facts are taken from the complaint and *are not findings of fact by the court* [emphasis supplied]". The second sentence appears in the Court's discussion section at pages *53-54, not page 19 as cited by Plaintiff's counsel. This selective quoting completely misstates the holding of this case. Contrary to what this pairing of sentences implies, the actual holding of the Crews Court with respect to absolute prosecutorial immunity actually supports County Defendants' alleged "simplistic" arguments.

The second sentence cited by Plaintiff from the Crews case focused on the prosecutor defendants acting in a non-judicial and investigatory function when they supervised a key aspect of the investigation, both prior to and subsequent to Plaintiff's arrest and in continuing to prosecute Plaintiff when they knew he was innocent. *Id.* at *53. However, those prosecutors played an integral role in the investigation of the Crews' plaintiffs before and after their arrests. Conversely, there is no allegation in the instant complaint that Defendant Taylor was involved in Plaintiff's criminal case until the investigatory stage of the case was over and the prosecutorial stage had begun. Therefore, the portions of the Crews case cited by Plaintiff are inapplicable to the instant case and are easily distinguishable.

Nevertheless, the actual holding of the Crews case, ignored by Plaintiff's counsel, clearly addresses the allegations that Plaintiff has leveled against Defendant Taylor in the instant complaint. The Crews court specifically held that the

> prosecutor defendants are entitled to absolute immunity for any failure to investigate Crews' alibis at the behest of his attorney or otherwise [and]. . . the prosecutor defendants are protected by absolute immunity for any alleged withholding of exculpatory material from, or taking of false testimony before, the County Court or the grand jury. Crews, at *51-52.

In the instant matter, Plaintiff claims that Taylor refused to investigate or acknowledge the "exculpatory" material elicited at the criminal trial. However, Taylor is entitled to prosecutorial immunity for these alleged actions or inactions because the Crews case makes clear that any failure to investigate exculpatory material produced by Plaintiff's counsel at trial and the alleged withholding of exculpatory material from, or the taking of false testimony before the Court is covered by absolute prosecutorial immunity. Crews, at *51-52. *See also* Bail v. Ramirez, 2007 U.S. Dist. LEXIS 25232, at *13-14 (S.D.N.Y. 2007) (absolute prosecutorial "immunity extends to activities associated with the decision to prosecute, including such acts as moving to suppress evidence and *choosing which witnesses to call* [emphasis supplied, citation omitted]"]. Therefore, all of Plaintiff's claims against Defendant Taylor should be dismissed in their entirety, with prejudice.

Moreover, although Plaintiff's counsel designates the information produced at the criminal trial as "exculpatory", said evidence did not prove that Plaintiff was innocent of the crime with which he was charged. Said "evidence" was merely his criminal attorney's theory as to why the Tarrytown Police Defendants arrested Plaintiff and not his neighbor on the date of the altercation. However, it is clear from the Complaint that Plaintiff's criminal defense attorney was responsible for eliciting the alleged "exculpatory" testimony at trial and for "delineating" the apparent conflict of interest to the court and the prosecutor Defendant Taylor. *See* paragraphs 16-18, Plaintiff's Complaint. Therefore, it is impossible for Defendant Taylor to have withheld or suppressed "evidence" that Plaintiff's defense counsel was not only *aware* of, but was responsible for producing during the trial. Even assuming *arguendo* that absolute prosecutorial immunity did not apply to the facts of this case, Plaintiff cannot seek to hold Defendant Taylor liable for withholding exculpatory information when the "information" at issue was neither withheld nor exculpatory.

Plaintiff's counsel also relies heavily on his interpretation of Barbera v. Smith, 836 F.2d 96 (2d Cir. 1987). Plaintiff's counsel states that the Second Circuit in Barbera "expressly renounced a 'bright line' rule based upon the time line of a prosecution, acknowledging that investigative function continues after the initiation of a prosecution" Plaintiff's memorandum in Opposition at p. 9. Although this statement would lead one to believe that the Barbera Court focused on a prosecutor's investigatory role *after* proceedings have commenced, a reading of this case makes clear that Plaintiff's counsel has misconstrued the Barbera Court's holding as well.

While the Second Circuit did state that it did "not intend to establish a bright line commencement-of-the-proceedings test" (*Id.* at 100), a reading of the entire case makes clear that the Barbera Court was acknowledging that absolute prosecutorial immunity could start before a proceeding was commenced, not that the investigatory role of a prosecutor continues after a proceeding has commenced. The Barbera court noted that the Second Circuit had not yet "addressed the question of whether the evidence-analyzing and case preparation functions performed by a prosecutor before the actual filing of an information or indictment constitute prosecutorial or investigative tasks" *Id.* at 100. However, such an inquiry is not necessary in the instant case because all of the actions taken by Defendant Taylor took place after the filing of charges and during the actual criminal trial. Therefore, it is the following recitation of existing case law in the Second Circuit that is applicable to the case at bar – absolute prosecutorial immunity "applies to the conduct of the actual litigation" Barbera, *supra*, at 99. Again, as all of the allegations against Defendant Taylor are limited to her role during the trial in the this matter (the "actual prosecution"), she is entitled to absolute prosecutorial immunity and all of Plaintiff's claims against her should be dismissed in their entirety with prejudice.

Plaintiff also cites Taylor v. Kavanagh, 640 F.2d 450 (2d Cir. 1981) to bolster his argument that defendant Taylor is not entitled to absolute prosecutorial immunity. However, said case provides some of the strongest language in favor of granting Taylor absolute immunity – "because a prosecutor is acting as an advocate in a judicial proceeding, the solicitation and subornation of perjured testimony, the withholding of evidence, or the introduction of illegally-seized evidence at trial does not create liability in damages." *Id.* at 452. Not only has Plaintiff's counsel failed to distinguish the case law cited in support of County Defendants' motion to dismiss, he has utterly failed to provide any relevant case law which would warrant the denial of absolute prosecutorial immunity to Defendant Taylor. What is clear from counsel's Memorandum in Opposition is that his disagreement with the concept of absolute immunity has clouded his legal analysis. Therefore, all of Plaintiff's claims against Defendant Taylor should be dismissed in their entirety.

To extent the that Plaintiff seeks to amend his Complaint with respect to Defendant Taylor, any such amendment would be futile and should be denied. Plaintiff's counsel requests that "[i]n the event that the Court does not see the requisite specificity in Plaintiff McGuire's pleading papers, he would pray leave to amend the pleadings as necessary" Plaintiff's Memorandum in Opposition, at p. 10. However, this is not a situation where the claims against Defendant Taylor were not plead with specificity – it is a situation where no matter how "specific" Plaintiff is, the claims against Taylor warrant dismissal. Unless Plaintiff intends to submit as yet unpled facts which show that Taylor acted outside the prosecution of this action, any amendment of the current pleadings would be futile and should not be allowed *See* Dougherty v. Town of North Hempstead, et al, 282 F.3d 83, 87-88 (2d Cir. 2002) (An amendment to a pleading will be futile if a proposed claim could not withstand a motion to dismiss pursuant to Rule 12(b)(6)). However, it strains credulity to believe that Plaintiff has any facts to add that have not been pled in the Complaint, or raised in his opposition. As neither the Complaint, nor the opposition, raise issues that warrant the denial of absolute immunity to Defendant Taylor, Plaintiff claims against Taylor should be dismissed in their entirety and any amendment by Plaintiff should be denied.

POINT II

THE COMPLAINT SHOULD BE DISMISSED WITH PREJUDICE AGAINST THE COUNTY DEFENDANTS

A. Plaintiff's Pendent State Law Claims Should Be Dismissed in Their Entirety, As He Failed to File a Notice of Claim against the County Defendants[4]

In opposition to County Defendants' assertion that Plaintiff failed to serve a Notice of Claim as required by N.Y. Gen. Mun. Law § 50-e (1)(a) and New York County Law § 52 (1), Plaintiff's counsel improperly cites cases that address service of process in Federal Court. These cases have no bearing on the issue of Plaintiff's admitted failure to file a Notice of Claim against the County Defendants. Indeed, Plaintiff's counsel's repeated citation to cases for propositions unsupported by those cases should not be countenanced. It is undisputed that the "failure to comply with provisions requiring notice and presentment of claims prior to commencement of litigation ordinarily requires

[4] The Court is respectfully referred to Point II(A) of the County Defendant's Memorandum of Law in Support of its Motion to Dismiss for a more complete discussion of this issue.

dismissal" Perez v. County of Nassau, 294 F.Supp.2d 386, 391 (E.D.N.Y. 2003). As Plaintiff has admittedly failed to file a Notice of Claim upon County Defendants, his pendent state law claims (his First and Second Causes of Action) should be dismissed with prejudice.

Plaintiff's counsel further "posits" that "the filing of the notice of claim with Tarrytown provided actual and effective notice to those defendants named therein." Plaintiff's Memorandum of Law in Opposition, at p. 11. Not only are County Defendants not named in said Notice of Claim, the service of a Notice of Claim on another municipality does not constitute service on or notice to a separate municipal entity.

Moreover, despite Plaintiff's plea to remedy an alleged "defect" in the notice by obtaining leave to file a late Notice of Claim, federal courts "do not have jurisdiction to hear complaints from plaintiffs who have failed to comply with the notice of claim requirement, or to grant permission to file a late notice of claim" Van Cortlandt v. Westchester County, et al, 2007 U.S. Dist. LEXIS 80977 (S.D.N.Y. 2007), at *23-24, *citing* Gibson v. Comm'r of Mental Health, 2006 U.S. Dist. LEXIS 27428 (S.D.N.Y. 2006). Pursuant to N.Y. Gen. Mun Law §50-e(7), any application to serve a late notice of claim must be made to the supreme court or to the county court. Therefore, as Plaintiff has failed to make a proper application to file a late notice of claim, his pendent state law claims against County Defendants should be dismissed in their entirety.

B. Plaintiff Fails to State a Cause of Action Against the County of Westchester[5]

Plaintiff's opposition does not directly address any of County Defendants' arguments as to Plaintiff's failure to state a cause of action against County Defendants. Initially, Counsel states that the Complaint contains allegations that "might lead a jury to find" that the Westchester County District Attorney has a policy and custom of refusing cross complaints. Plaintiff's Memorandum in Opposition, at p. 12. However this bald assertion, without factual allegations to support it, does not approach a specific allegation of fact sufficient to preclude the granting of a motion to dismiss in favor of County Defendants. Indeed, "[t]o avoid dismissal, a plaintiff must do more than plead mere 'conclusory allegations or legal conclusions masquerading as factual conclusions.'" Young v. Strack, 2007 U.S. Dist. LEXIS 39771, at *8 (S.D.N.Y. 2007), *citing* Gebhardt v. Allspect, Inc., 96 F. Supp.2d 331, 333 (S.D.N.Y. 2000).

In addition, County Defendants have extensively outlined Plaintiff's failure to allege a County policy in the Complaint (the Court is respectfully referred to pages 11-12 of County Defendants' Memorandum in Support of its motion to dismiss).[6] In response, Plaintiff merely reiterates that the complaint and its attachments "might" lead a jury to find that the County had such a policy. However, the Complaint does not state that the Westchester County District Attorney's office had a policy and custom of refusing cross complaints.[7] In fact, the Complaint does not even allege that the County Defendants refused Plaintiff's own cross complaint. The only allegation contained in the Complaint indicates that Plaintiff called the intake unit of the District Attorney's office and was referred to counsel assigned to the local justice court. There is no allegation that Plaintiff was told by the County Defendants that his "cross complaint" was being refused.

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[5] The Court is respectfully referred to Point II(B) of the County Defendant's Memorandum of Law in Support of its Motion to Dismiss for a more complete discussion of this issue.
[6] Indeed, the Complaint and its attachments are very clear that the policy alleged in the Complaint is the Village of Tarrytown's policy, not the policy of the Westchester County District Attorney's Office.
[7] Paragraph 22 of Plaintiff's complaint states "[t]hat it is and was the custom and policy of the Village, its officers and departments, as well as that of Westchester County and its District Attorney's Office, to allow and/or prevent the lodging of complaints in an arbitrary and capricious manner".

As there is no factual allegation of a County policy contained anywhere in the Complaint or its attachments, Plaintiff's statement that a jury "might" find a county policy is baseless. "Beyond the broad allegations of his pleadings, [Plaintiff] presents no evidentiary support for the existence of such a municipal policy, custom or practice, nor any indication of how any such [County] conduct resulted in the harms [Plaintiff] suffered…The existence of a municipal policy or practice entailing deprivations of constitutional rights cannot be grounded solely on the conclusory assertions of the plaintiff." Younger v. City of New York, 480 F. Supp. 2d 723, 733 (S.D.N.Y. 2007). Therefore, as Plaintiff has not plead an official policy or custom of the County of Westchester that caused him to be subjected to a denial of a constitutional right, all of Plaintiff's claims against the County of Westchester should be dismissed with prejudice in its entirety. Id.

Plaintiff's counsel also states that the Complaint contains allegations and attachments that "might" lead a jury to find that

> there was a *conspiracy*[8] between the police defendants and the assistant district attorneys, . . .that defendant ADA Taylor and her as of yet unnamed supervisors *failed to intervene* upon learning that plaintiff McGuire deserved their protection, . . that the County defendants in their disregard maliciously prosecuted plaintiff, and . . . that such misconduct was fostered by a lack of training and supervision by the highest levels of that prosecutor's office. [Emphasis in original] Plaintiff's Memorandum in Opposition, at p. 12.

[8] Plaintiff's claims of conspiracy are addressed *infra* at Point III.

However, Plaintiff's Complaint does not contain causes of action for failure to intervene or failure to train or supervise and his attempt to assert said claims in his opposition is belated. Moreover, the Complaint is utterly devoid of any factual allegations from which one could conclude that there was a failure to intervene or a lack of training or supervision by the Westchester County District Attorney's office.[9]

Furthermore, to the extent that Plaintiff is pursuing malicious prosecution claims against County Defendants, said claims should be dismissed in their entirety. As discussed, Defendant Taylor is entitled to both Eleventh Amendment and absolute prosecutorial immunity for any allegation of malicious prosecution under state and federal law. Shmueli, *supra*, and Johnson, *supra*. Moreover, while a claim for "malicious prosecution may be based on a theory of *respondeat superior* where they are asserted as state law claims, they must satisfy Monell [v. Dep't of Soc. Servs., 436 U.S. 658, 694, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)] when asserted under section 1983" Fulton v. Felder, 2007 U.S. Dist. LEXIS 56213 (S.D.N.Y. 2007), at * 11. As discussed *supra*, Plaintiff's state law claims against the County must be dismissed as he failed to file a Notice of Claim. Moreover, as Plaintiff has also failed to allege a County policy as required by Monell, his federal malicious prosecution claims against the County Defendants should also be dismissed in their entirety.

C. Plaintiff's claims under the First Amendment, Second Amendment, Fourth Amendment and Fourteenth Amendment

As Plaintiff fails to address any of the arguments made by County Defendants with respect to Plaintiff's claims under the First Amendment, Second Amendment,

[9] Moreover, plaintiff's reliance on Noga v. Potenza, 221 F.Supp.2d 345 (N.D.N.Y. 2002) is completely misplaced. This case does not involve a County defendant, nor a prosecutor defendant, so the holdings of said case are not relevant to the claims against the County Defendants and should be disregarded.

Fourth Amendment and Fourteenth Amendment, the Court is respectfully referred to Point II(C) of the County Defendant's Memorandum of Law in Support of its Motion to Dismiss. For all the reasons stated therein, Plaintiff's purported claims against County Defendants under the First Amendment, Second Amendment, Fourth Amendment and Fourteenth Amendment should be dismissed in their entirety.

POINT III

PLAINTIFF HAS FAILED TO STATE A CLAIM AGAINST COUNTY DEFENDANTS UNDER 42 U.S.C. §§1985 OR 1986[10]

Again, Plaintiff completely fails to address the specific arguments propounded by County Defendants in their motion to dismiss with respect to Plaintiff claims under §1985 and §1986. Plaintiff does not dispute County Defendants' assertion that Plaintiff alleges his §1985 claim only against the Village Defendants. *See* Plaintiff's Fourth Cause of Action ¶ 26-28, wherein Plaintiff refers only to the "police defendants". Plaintiff's failure to dispute County Defendants' arguments is tantamount to an admission that said claim is only asserted against the Tarrytown Police Defendants. Therefore, Plaintiff does not allege any facts to maintain the claimed violation of 42 U.S.C. §1985 by the County Defendants. Moreover, as a §1985 claim cannot be sustained against County Defendants, Plaintiff's Fifth Cause of Action pursuant to §1986 must be dismissed as well. *See*, Rivera v. Goord, 119 F. Supp. 2d 327, 345 (S.D.N.Y. 2000). Consequently, Plaintiff Fourth and Fifth Causes of Action under §1985 and §1986 must be dismissed for failure to state a claim against the County Defendants.

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[10] The Court is respectfully referred to Point III of the County Defendant's Memorandum of Law in Support of its Motion to Dismiss for a more complete discussion of this issue.

CONCLUSION

It is respectfully submitted that this Honorable Court grant the instant motion to dismiss Plaintiff's Complaint in its entirety inasmuch as Plaintiff fails to state any claims against the County Defendants upon which relief may be granted, together with costs, fees, disbursements, and such other and further relief as this Honorable Court deems just and proper.

Dated: White Plains, New York
June 13, 2008

Respectfully submitted,

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